

D.P.U. 87-DS-57

Adjudicatory hearing in the matter of a possible violation of General Laws Chapter 82, Section 40
by A.J. Schnopp, Jr.

APPEARANCES: A.J. Schnopp, Jr.
899 South Street
Dalton, Massachusetts 01226

PRO SE
Respondent

Christopher Bourne
Division of Pipeline Engineering and Safety
Department of Public Utilities
100 Cambridge Street
Boston, Massachusetts 02202

FOR: THE DIVISION OF PIPELINE ENGINEERING
AND SAFETY

I. INTRODUCTION

On July 6, 1987, the Pipeline Safety and Engineering Division ("Division") of the Department of Public Utilities ("Department") issued a Notice of Probable Violation ("NOPV") to A. J. Schnopp, Jr. ("Respondent"). The NOPV stated that the Division had reason to believe that the Respondent performed excavations at his home at 574 Main Street, Dalton, Massachusetts in violation of G.L. c. 82, § 40 ("Dig-Safe Law"). The Respondent allegedly failed to give notification to operators of underground utilities in the area at least seventy-two hours before excavating, causing damage to a facility operated by Berkshire Gas Company ("Company" or "Berkshire") .

On August 3, 1987, the Respondent answered by letter and denied that he had violated the Dig-Safe Law. In that letter, the Respondent alleged that he had been removing a shrub in front of his house and was not excavating for underground utilities, and that his violation did not fall under the jurisdiction of the Dig-Safe Law. In a letter dated August 6, 1987, the Division informed the Respondent of its determination that the Respondent had violated the Dig-Safe Law and informed the Respondent of its right to request an adjudicatory hearing. In that decision, the Division found that the Respondent excavated to a depth of between 18 and 20 inches, a depth greater than that which is used to garden or rototill, and therefore, was in violation of the Dig-Safe Law.

On August 18, 1987, the Respondent requested an adjudicatory hearing pursuant to 220 C.M.R. § 99.07(3). After due notice, an adjudicatory hearing was held on March 15, 1988, pursuant to 220 C.M.R. 99.00 et seq. Christopher Bourne, a public utility engineer from the

Division, represented the Division. The Division offered two exhibits. Mr. Schnopp, Jr. testified at the hearing. No exhibits were presented by the Respondent.

II. SUMMARY OF THE FACTS

A. The Division's Position

At the hearing, Mr. Bourne submitted a Company underground damage report (Exh. D-1). In that report, Berkshire alleged that the Respondent had damaged two permanent couplings and plastic service line which was located at a depth of 18 inches, at 574 Main Street, in Dalton (id.). In the report, the Company indicated that the Respondent was installing sauna tubes for an addition to his porch, and that he knew gas service existed in the area (id.).¹ The report noted that the Respondent failed to provide proper notice to the Company, and that the Respondent wasn't aware that Dig-Safe notice was required on private property (id.).

Mr. Bourne contended that the Respondent had violated the Dig-Safe Law by failing to notify operators of underground utilities located in the area of the excavation (Tr. at 5, 11). Mr. Bourne testified that the Dig-Safe Law clearly applied to excavations on private property (id. at 11, 17). He further testified that the only instance in which Dig-Safe notice was not required was when a party was gardening or tilling (id. at 11). Mr. Bourne contended that a depth of between 18 and 20 inches is deeper than any normal gardening activity (id. at 11). He testified that gardening is generally the planting and cultivating of a vegetable or flower garden and that the depth of gardening would generally not exceed six inches (id. at 15, 18).

¹ At the hearing, the Division presented no evidence in support of these statements.

Mr. Bourne testified that there was no standard regarding the depth of gardening or tilling (id. at 15). Mr. Bourne observed that removing or planting trees and shrubs is landscaping rather than gardening and as such requires Dig-Safe notice (id. at 15-16). He noted that the federal and state law prescribing the depth of gas service lines requires a minimum depth of twelve inches, and the Respondent's gas service line was lower than the minimum federal requirements (id. at 15-16).

B. The Respondent's Position

Mr. Schnopp admitted to damaging the facility with steel shovels while he was chopping off the roots of a large shrub to remove the shrub because it was blocking the view from his porch (id. at 4, 8). He stated that the bush was located directly above a Company service line which was 18 to 20 inches deep (id. at 5-7). The Respondent testified that he notified the Company immediately after the damage occurred (id. at 4, 21).

Mr. Schnopp testified that he did not violate the Dig-Safe Law for the following reasons: he was digging by hand and did not use machinery to excavate; as a private land owner who was not working for an excavator, it is a violation of his personal rights to be prevented from planting shrubbery in his own yard;² and finally, the removal of a large shrub should be considered gardening and not excavating (id. at 4-5, 13-14, 19). He further contended that cultivating, gardening and tilling can require excavation deeper than 18 to 20 inches below the surface (id.

² The Dig-Safe Law clearly states that all persons performing excavation on public or private property are responsible for notifying companies with underground facilities in the area before excavating, and complying with all other provisions of the Dig-Safe Law, with the only exceptions being gardening or tilling on private property. See G.L. c. 82, § 40, infra.

at 12-13, 18). Mr. Schnopp asserted that in order to reach the roots of a peony, a person must excavate to a depth of at least 24 inches (id. at 14).

III. STANDARD OF REVIEW

G.L. c. 82, § 40, in pertinent part, provides that:

No person shall, except in an emergency, contract for, or make an excavation ... which shall not be deemed to include gardening or tilling the soil in the case of privately owned land ... unless at least seventy-two hours, exclusive of Saturdays, Sundays and legal holidays ... before the proposed excavation is to be made such person has give an initial notice in writing of the proposed excavation to such natural gas pipeline companies ... in or to the city or town where such excavation is to be made.

The statute is clear and unambiguous. Any company, contractor or person must properly notify the appropriate operators of underground utilities at least 72 hours before beginning an excavation. Industrial Contractors and Developers, D.P.U. 86-DS-25 (1988); John Farmer, D.P.U. 86-DS-102 (1987).

The Department's regulations at 220 C.M.R. 99.02 define excavation as:

... the movement or removal of earth, rock, ledge or other materials in the ground to form a cavity, hole, hollow or passage therein. It shall include, but not be limited to digging; trenching; grading; scooping; tunneling; augering; ...; [or the] demolition of any structure Excavation shall not mean gardening or tilling the soil in the case of privately owned land.

IV. ANALYSIS AND FINDINGS

The issue to be resolved in this case is whether the activities which damaged the Company's line conformed to the definition of "excavation." The Respondent contended that the removal of the shrub constituted gardening, not excavation, within the meaning of the

statute, an accordingly was not a violation of the Dig-Safe Law. The Division contended that the Respondent was landscaping, and therefore he was excavating within the meaning of the Dig-Safe Law.

The Division failed to present any evidence that showed the Respondent's activities were landscaping or excavating, as it contended. The Respondent was not digging a hole, but chopping the roots of the bush so that the bush could be removed. Substantial evidence was not presented by the Division showing that the Respondent was planning to excavate after the bush was removed. In fact, the Division did not present a Company witness, nor did it present a witness who had visited the site. Therefore, the Department agrees with the Respondent and finds that the Respondent was gardening when he damaged the facility of the Company, and as such, did not require notice to companies with underground facilities in the area.³ Accordingly, the Department finds that the Respondent has not violated the Dig-Safe Law.

V. ORDER

³ We caution that this finding should not be construed as approval of the Respondent's actions, nor as a pronouncement of a new standard for excavators to follow. Under slightly different circumstances, the exception set forth in the Dig-Safe Law may not have applied in this case. We encourage all persons who perform activities on private property which may damage underground facilities to err on the side of caution by contacting all utility companies which have underground facilities in the area of excavation, or Dig-Safe System, Incorporated.

Dig-Safe System, Inc. is a non-profit organization which can be contacted by an excavator to properly notify all utility companies which have underground facilities in the area of an excavation. As mentioned previously, the Dig-Safe Law applies to persons performing excavation on private property. When an excavation is started by individuals on private property where underground facilities may be located, those individuals must be cognizant of the possible existence of those facilities, and (or) contact Dig-Safe System, Inc. or companies with underground facilities in the area to determine the location of those facilities, and thereby excavate in a safe manner and lessen the possibility of unnecessary damage.

Accordingly, after due notice, hearing, and consideration, the Department

FINDS: That A. J. Schnopp, Jr. was not required to provide notification before commencing excavation at 574 Main Street in Dalton, Massachusetts, on May 15, 1987, and therefore, is not in violation of the Dig-Safe Law and it is

ORDERED: That the NOPV issued against the Respondent is hereby Dismissed.

By Order of the Department,